

Claimant requests review of the ALJ's finding that his permanent impairment was limited to his right lower extremity. Claimant contends that as a result of his work-related accident in March 2007, he also aggravated preexisting conditions involving his left knee and his low back and that he is entitled to a combined impairment of 12 percent to the whole body.

Respondent did not file a brief in this appeal, but during oral argument to the Board requested that the ALJ's Award be affirmed.

The issue for the Board's review is: What is the nature and extent of claimant's disability?¹

FINDINGS OF FACT

On March 4, 2007, claimant tripped and fell at work. He testified that as he fell, both knees struck the concrete floor, but the right knee was worse than the left.² He was sent to Boeing Medical and later referred to Dr. Patrick Do for treatment. On March 12, 2007, Dr. Do performed surgery to repair a fractured right patella. After the surgery, claimant was on crutches for a few weeks. By May 3, 2007, claimant told Dr. Do he did not wish to attend physical therapy because his knee was doing well. Dr. Do released claimant from care on May 24, 2007, and rated him as having a 7 percent permanent partial impairment to his lower extremity based on the *AMA Guides*.³ He did not impose any permanent physical restrictions on claimant.

In direct examination, claimant testified that about a month after he was released from treatment by Dr. Do, he started to experience pain in his left knee, which he attributed to overuse, and his low back, which he attributed to an altered gait. On cross-examination, he claimed that during the time he was on crutches he noticed he had an altered gait and also noticed that he had pain and discomfort in his left knee. He admitted he did not tell Dr. Do about his left knee pain or his altered gait, stating he did not do so because Dr. Do was treating his right knee only.

Dr. Do testified he had no notation in his record with regard to any complaints about claimant's left knee or low back. He said that within a reasonable degree of medical probability, claimant's impairment resulting from the March 2007 accident was restricted to his right knee. He said that a patella fracture can result in overuse of the other lower extremity, but it is not as likely as some other knee problems because the kneecap is in front of the knee and the patient would be allowed full weight-bearing. He also testified that he could not think of any cases where a patella fracture had caused an altered gait,

¹ Claimant's Request for Review listed unauthorized medical treatment as an issue, but at oral argument before the Board, claimant's counsel announced that it was not an issue and that claimant was satisfied with the ALJ's order in that regard.

² Claimant agreed that the accident report notes that he hit only his right knee when he fell. Further, he agrees that none of the medical records indicate that claimant's left knee hit the floor during his fall.

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

but would not be surprised if it occurred. Dr. Do stated that if claimant had presented with an altered gait, he would have made a notation of such in his progress notes.

Claimant had previously undergone surgery on his left knee in the 1980s and had used a cane for about nine to ten years. Claimant also had an injury to his low back in September 2006 when he was cutting down a tree at his home. He was diagnosed with a fracture at L1 and crushed disks at L3 and L4. Prior to his March 2007 work-related accident, claimant had received treatment in the form of pain medication for both his left knee and his low back from Dr. Schneider from the Schneider Clinic. He could not return to Dr. Schneider after his release from treatment by Dr. Do because of problems Dr. Schneider was having during that period of time. Because claimant was no longer on prescription pain medication, he began to notice pain and discomfort in his left knee and low back. He states that he has daily pain and takes an Advil every evening so that he can sleep. Claimant is not receiving any treatment for his left knee pain or his low back pain, and the last physician who treated him for his right knee was Dr. Do.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. At the request of claimant's attorney, he examined claimant on September 20, 2007. Claimant told him he had tripped over a tool stand and fell flat on his chest, striking his right knee on the floor first. X-rays showed that claimant had a fractured patella. Claimant was referred to Dr. Do, who performed surgery, an open reduction, internal fixation of the right patella fracture.

After examining claimant, Dr. Murati's impression was that claimant had right knee status post surgery, left knee patellofemoral syndrome secondary to overuse, low back pain with radiculopathy with aggravation after right knee injury, left sacroiliac joint dysfunction, and right patellofemoral syndrome. It is Dr. Murati's opinion that claimant's previous low back and left knee conditions were aggravated by the accident in March 2007.

Dr. Murati said that when claimant expressed his complaints to Dr. Murati, the only complaint claimant made in regard to his left knee was that he occasionally had swelling in both knees. Claimant did not tell Dr. Murati that he was having problems with his left knee due to overuse. That was a conclusion Dr. Murati came to. Dr. Murati opined that claimant's preexisting left knee condition was aggravated by overuse.

Further, claimant did not mention any problems in regard to his low back when telling Dr. Murati about his current complaints. He did not tell Dr. Murati that his right knee injury aggravated his back condition. Dr. Murati said that his general experience was that bad lower extremities can lead to a bad back and, in this case, because claimant had a preexisting back condition, he concluded the back condition was aggravated by the March 2007 injury. He believed that claimant's preexisting low back condition was aggravated because of an altered gait.

Based on the *AMA Guides*, Dr. Murati rated claimant as having a 7 percent permanent partial impairment to his right lower extremity for his patellar fracture, plus an extra 5 percent for patellofemoral syndrome.⁴ He rated claimant as having a 5 percent permanent partial impairment to the left lower extremity patellofemoral syndrome secondary to overuse. For claimant's low back pain due to aggravation, he rated claimant as having a 5 percent permanent partial impairment to the whole body. Converting the lower extremity ratings to body as a whole, and combining those ratings with the low back rating, Dr. Murati found that claimant had a 12 percent permanent partial impairment to the whole body related to this accident.

Dr. Murati said that claimant needs to have a sit-down job and needs a cane for ambulation. He should rarely stand, walk, bend, crouch and stoop, or climb stairs. He should not climb ladders, squat, crawl, drive a manual transmission vehicle, kneel, or use repetitive foot controls with both legs. He should restrict his lifting to 10 pounds occasionally and 5 pounds frequently. Dr. Murati said that claimant would definitely need both knees replaced in the future.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

⁴ Dr. Do testified that patellofemoral syndrome is a general term for pain from alignment issues of the kneecap and is not a separate rateable condition from the kneecap under the *AMA Guides*. Dr. Do testified that in claimant's case, the highest rating for a kneecap is 7 percent for cartilage damage, and patellofemoral syndrome would be the same thing.

⁵ K.S.A. 2008 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁷ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁸ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁹

ANALYSIS

It is uncontradicted that claimant has, at a minimum, a 7 percent permanent impairment to his right leg. This fact was established by Dr. Do's rating on June 13, 2007.¹⁰ The issue on appeal is whether claimant's permanent partial disability award should be based on or otherwise factor in Dr. Murati's higher rating to the right lower extremity and his ratings to claimant's left lower extremity and low back. Claimant made no complaints to Dr. Do about either his left knee or his back. This is because, according to claimant, these symptoms started after he was released from Dr. Do's care on May 24, 2007. Claimant attributes his symptoms to overuse and an altered gait caused by his right knee injury. But claimant declined the physical therapy offered by Dr. Do because his right knee was doing so well. Furthermore, claimant had an altered gait before his March 4, 2007, right knee injury. Claimant also had preexisting left knee and low back conditions for which he was still receiving treatment, including pain medication, either at the time of his work-related accident with respondent or within close proximity of that accident. It is most likely that claimant's current left knee and low back conditions are a natural consequence of his preexisting conditions rather than his accident with respondent on March 4, 2007.

CONCLUSION

Claimant is entitled to an award of permanent partial disability compensation for a 7 percent permanent impairment to his right leg, which occurred as a direct result of his March 4, 2007, accident at his work with respondent. A disability award is denied for any permanent impairments to his left knee or back.

⁷ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁸ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

¹⁰ Do Depo., Ex. 1 at 1.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated July 28, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge